STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2003
v	No. 237773 Wayne Circuit Court
MARCUS L. WALKER, Defendant-Appellant.	LC No. 00-011373

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to commit murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of natural life imprisonment for the first-degree murder conviction, forty to sixty years' imprisonment for each of the assault with intent to commit murder convictions, and 13-1/2 to 20 years' imprisonment for the first-degree home invasion conviction, to be served consecutive to a sentence of two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm in part, but remand for modification of defendant's sentence for first-degree home invasion to comport with the two-thirds rule.

Defendant's convictions arise from his participation in an incident in which defendant, along with codefendants Jafari Martin and Harold Shaw,[1] broke into a house to steal money. Mary Shakur, her two young children, and her teenage brother were home at the time. Shakur and her four-month-old daughter were both shot during the ordeal. Shakur died from a single gunshot to her forehead, while Shakur's daughter received a nonfatal gunshot wound in the shoulder. After leaving Shakur's residence, defendant shot at LeMario Simmons as Simmons drove by defendant in an alley.

I

[1] Codefendants Martin and Shaw were tried jointly before a single jury. *People v Martin*, Docket No. 234921 and *People v Shaw*, Docket No. 234923, have been submitted on appeal with this case.

Defendant first argues that a new trial is required because the trial court's jury voir dire was inadequate and because the court precluded trial counsel from conducting the voir dire. In this case, defense counsel did not object to the manner in which the court conducted voir dire. Instead, counsel expressed satisfaction with the jury at the close of voir dire. Thus, defendant has waived the issue for appellate review. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 593 (1996); *People v DePlanche*, 183 Mich App 685, 691; 455 NW2d 395 (1990). Therefore, we decline to address this issue.

II

Defendant next argues that the trial court erred by not sua sponte giving the cautionary accomplice instructions, CJI2d 5.5 and 5.6, relative to the testimony of the prosecution's witness David Harrison whom defendant claims is a disputed accomplice. Because defendant did not request the instruction, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Under *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974), a trial court's failure to sua sponte give a cautionary instruction on accomplice testimony may require reversal if the issue is closely drawn. However, there is no rule of automatic reversal. *People v Reed*, 453 Mich 685, 692; 556 NW2d 858 (1996). As the Court in *Reed* observed, "*McCoy* stands for the proposition that a judge should give a cautionary instruction on accomplice testimony sua sponte when potential problems with an accomplice's credibility have not been plainly presented to the jury." *Id.* at 692-693.

Here, the potential problems with Harrison's testimony were thoroughly explored at trial. The record shows that defendant successfully brought to the jury's attention the fact that Harrison had been considered a suspect in this case. The evidence was overwhelming that Harrison's minivan was linked to the offense at Shakur's home. The record reflects that Harrison was speaking with defendant on the street of Shakur's home before the crime was committed. Further, Harrison's minivan was left behind near the scene of the crime with miscellaneous gun parts, an ammunition box and a facemask in it. Nonetheless, no evidence was presented in this case to establish that Harrison knowingly and willingly planned, or participated in the offenses as an accomplice. Without such evidence, it cannot be said that the trial court erred by not sua sponte giving a disputed accomplice instruction. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993).

We are not persuaded with defendant's assertion that the case was closely drawn in that it presented a credibility contest between defendant and Harrison. *People v Jensen*, 162 Mich App 171, 188; 412 NW2d 681 (1987). Defendant's custodial statement that was admitted into evidence as part of the prosecutor's case in chief did not implicate Harrison in the crime as an accomplice.[2] Other evidence, apart from Harrison's testimony, linked defendant to the crime. Defendant fails to show plain error on the record. Accordingly, the trial court was not obligated

[2] Defendant did not testify at trial.

to sua sponte give a disputed accomplice jury instruction. See *People v Perry*, 218 Mich App 520, 529-530; 554 NW2d 362 (1996), aff'd 460 Mich 55; 594 NW2d 477 (1999).

III

Defendant next argues that the evidence was insufficient to sustain his conviction for assault with intent to commit murder with respect to Lemario Simmons. We disagree. The requisite intent to kill may be inferred from any facts in evidence and, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Viewed most favorably to the prosecution, Simmons' identity of defendant as one of the men who fired gunshots at his vehicle, evidence that several bullets struck Simmon's vehicle, including the driver's side door, and the fact that the spent bullets retrieved from the vehicle were fired from a weapon found behind defendant's residence, were sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant assaulted Simmons with the intent to kill him. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *McRunels, supra.*

IV

Defendant next argues that he was denied a fair trial because of the prosecutor's misconduct. Because defendant did not make an appropriate objection to the challenged conduct at trial, we review this issue under the plain error standards applicable to unpreserved issues set forth in *Carines, supra* at 763-764. See *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The prosecutor's remarks are examined in context to determine if defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).

Here, the prosecutor's remarks in closing argument do not reflect that the prosecutor was improperly commenting on defendant's failure to testify. Although the prosecutor made a broad remark about the evidence being "uncontested," the prosecutor focused on the evidence to explain his position. Examined in context, there was no plain error. *Perry, supra* at 538.

Defendant next argues that the prosecutor denigrated defense counsel during counsel's closing argument. We conclude that the prosecutor's remark that counsel had made a "ridiculous" statement, examined in context, did not constitute a personal attack on defense counsel or otherwise infringe upon defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Rather, the prosecutor was commenting on the inferences that defense counsel was attempting to draw from the evidence that was the basis for counsel's statement. Although the prosecutor's conduct was improper, we conclude that the isolated remark did not deprive defendant of a fair trial. "[I]n the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are to be held prejudicial." *People v Lawton*, 196 Mich App 341, 354; 492 NWW2d 810 (1992) (citation omitted).

Defendant also argues that the prosecutor improperly implied in closing argument that defense counsel had presented a deceptive defense to place the blame on others. Examined in context, the prosecutor's remarks suggested that the evidence against defendant was strong and that the defense theory was weak. It is not improper for a prosecutor to comment on the

weakness of a defense theory or to argue that evidence was uncontroverted. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Further, any perceived prejudice could have been cured by a timely instruction. Defendant has not shown an outcome-determinative plain error. *Schutte, supra* at 721-722.

Defendant next argues that the prosecutor improperly argued that defense counsel was misleading the jury. While it is improper for a prosecutor to suggest that a defense attorney was attempting to mislead the jury, *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001), viewed in context, the challenged rebuttal remarks do not indicate that the prosecutor was personally attacking defense counsel. Rather, the prosecutor was arguing that defense counsel had inaccurately characterized the evidence in her closing argument. See *Id*. The remarks were not improper or otherwise such as to deprive defendant of a fair trial. *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Finally, we reject defendant's claim that the prosecutor improperly vouched for the credibility of witness Harrison during closing and rebuttal arguments. The prosecutor did not indicate any special knowledge concerning Harrison's truthfulness or inject a personal opinion about Harrison's truthfulness. *People v Bahoda*, 448 Mich 261, 276, 286-287; 531 NW2d 659 (1995). Rather, viewed in context, the prosecutor argued that Harrison was not involved in the crimes based on the evidence. The prosecutor was free to argue the evidence and all reasonable inferences from the evidence. *Id.* at 282. Given the above, the challenged remarks were either proper or did not rise to a level warranting a new trial. Defendant has not shown any outcome-determinative plain error that, either singularly or cumulatively, warrants a new trial.

V

We next consider defendant's challenge to the trial court's denial of his motion to suppress evidence of his statement to Detroit Police Sergeant Ernest Wilson. Defendant failed to preserve his claim that the trial court failed to require the prosecutor to prove that defendant knowingly and intelligently waive his *Miranda*[3] rights, because defendant did not move to suppress his statement on this ground below. Determining whether a waiver was knowingly and intelligently made involves a distinct inquiry from the voluntariness of the waiver. *People v Daoud*, 462 Mich 621, 635-636; 614 NW2d 152 (2000). In any event, the trial court found that defendant understood his rights, and defendant's cursory argument on appeal is insufficient to show any basis for disturbing this finding.

We have reviewed the voluntariness of defendant's statement independent of the trial court's determination, but have given deference to the trial court's factual determination that defendant was not a credible witness. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Considering the totality of the circumstances, we are not left with a definite and firm conviction that a mistake was made. *Id.* at 752-753; *People v Cipriano*, 431 Mich 315, 334-335; 429 NW2d 781 (1988). Although there was delay of over twenty-four hours between the time of defendant's arrest and his statement, it was not so lengthy to give rise to a presumption of unreasonableness or involuntariness. "[A] delay of more than *forty-eight* hours

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

after arrest is presumptively unreasonable, absent extraordinary circumstances." *People v Manning*, 243 Mich App 615, 623; 624 NW2d 746 (2000) (citation omitted and emphasis added). From our review of the record, we conclude that Wilson's testimony concerning the circumstances of defendant's statement was sufficient to establish, by a preponderance of the evidence, that defendant's statement was voluntarily given. *Daoud, supra* at 634.

Defendant also argues that the trial court improperly determined that defendant waived his right to counsel. To invoke the right to counsel during custodial interrogation, an accused must make a statement that can reasonably be construed to be an expression of a desire for the assistance of counsel. *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001). Giving deference to the trial court's finding that defendant was not a credible witness, and from our review of the record, we uphold the trial court's finding that defendant did not invoke his right to counsel. *Id*.; *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997).

VI

Next, defendant seeks a new trial, or remand for a *Ginther*[4] hearing, on the ground that he was denied the effective assistance of counsel. Because an evidentiary hearing was not held in the trial court, this Court's review is limited to the facts of record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Although this Court is empowered to remand for an evidentiary hearing, MCR 7.216(A)(5) and (7), the burden is on defendant to show that a remand is warranted. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). This Court previously denied defendant's motion to remand for a *Ginther* hearing.

To establish that counsel was ineffective, a defendant must show that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Avant, supra* at 507. A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Id*. at 507-508.

We are not persuaded that defendant has established either a basis for reversal or that remand for a *Ginther* hearing is warranted. The facts of record do not support defendant's claim that defense counsel was ineffective at the suppression hearing concerning the admissibility of defendant's custodial statement. Although an accused's exercise of his right to remain silent is distinct from an accused's assertion of the right to counsel, *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996), defendant has not cited any factual support from the record for his claim that he exercised his right to remain silent. Defendant's testimony at the suppression hearing indicated that he requested counsel. However, defendant was not prejudiced by counsel's omission because the trial court did not believe defendant's testimony. Hence, it is not reasonably probable that, but for defense counsel's alleged error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

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[4] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

Because the facts of record do not indicate that a police officer would have corroborated defendant's testimony if called as a defense witness at the suppression hearing, we further reject defendant's claim that defense counsel's failure to call such witnesses constituted deficient performance or was prejudicial. Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Similarly, the facts of record do not indicate that counsel's failure to produce defendant's medical records from the jail amounted to either deficient performance or caused prejudice. Defendant has not shown that the alleged medical records would have provided him with a substantial defense at the suppression hearing. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

We also reject defendant's claim that counsel was ineffective for failing to request the cautionary accomplice instruction relative to Harrison's trial testimony. The fact that counsel chose to argue that Harrison was involved in the charged offenses did not warrant such instruction. As previously discussed, the cautionary accomplice instruction was not warranted in this case, nor was defendant prejudiced by its absence. Hence, defendant's claim of ineffective assistance on this ground cannot succeed.

We decline to consider defendant's claim that his counsel was ineffective for failing to object to alleged prosecutorial misconduct in closing argument because defendant fails to cite to the factual basis for the claim and he fails to show how counsel's alleged failure to object was prejudicial. Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

VII

Defendant next argues that the trial court's failure to ascertain on the record whether he intelligently and knowingly waived his right to testify at trial warrants reversal. We disagree. Defendant did not preserve this issue by raising it at trial. *Carines, supra* at 763. Defendant has not shown any error because an on-the-record waiver is not required in Michigan and the trial court had no duty to advise defendant of the right to testify, nor was it required to determine whether defendant made a knowing and intelligent waiver of the right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

VIII

Defendant next argues that the cumulative effect of the errors at trial deprived him of a fair trial. "The cumulative effect of a number of errors may amount to error requiring reversal." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). However, "only actual errors are aggregated to determine their cumulative effect." *Bahoda*, *supra* at 292 n 64. In light of our resolution of defendant's various claims on this appeal, we conclude that defendant has not established any actual errors that deprived him of a fair trial. *Id.*

IX

In his final issue, defendant challenges the length of his sentences for the two convictions of assault with intent to commit murder and his conviction of first-degree home invasion. Although defendant did not raise this issue in the statement of questions presented section of his

brief, as required by MRE 7.212(C)(5), we will consider the issue. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999).

Defendant's minimum sentence of 13-1/2 years (162 months) for his first-degree home invasion conviction is more than two-thirds the maximum sentence of twenty years, contrary to MCL 769.34(1)(b). Hence, we remand to the trial court for modification of the minimum sentence to its lawful limit of thirteen years and four months (160 months). MCL 769.24; *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). Resentencing is not warranted because defendant does not allege either a scoring error or that inaccurate information was improperly considered and, upon modification, the sentence will be within the recommended sentence range of 99 to 160 months under the legislative sentencing guidelines. MCL 769.34(10).

Defendant has failed to establish that resentencing is warranted for the two counts of assault with intent to commit murder on the ground that they are disproportionate. The sentencing guidelines range for these counts was 225 to 375 months. The trial court relied on the gravity of the offenses as justification for exceeding this range. Even if the trial court failed to operate within the applicable statutory framework, MCL 769.34(3), we conclude that resentencing is not warranted in light of our decision to affirm defendant's conviction and sentence of natural life imprisonment for the first-degree murder conviction. Accordingly, we decline to further address defendant's request for resentencing. See *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992). Accordingly, we need not consider this proportionality challenge because it concerns the lesser of the convictions. *Id.*

Affirmed in part and remanded for modification of defendant's sentence for first-degree home invasion consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly